11-3100-20576-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMISSIONER OF VETERANS AFFAIRS

Steven Robert Shannon,

Petitioner,

vs.

City of Minneapolis,

Respondent.

**ORDER REGARDING APPLICABILITY OF VETERANS PREFERENCE ACT TO PETITIONER'S POSITION**

This matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of Petition and Order for Hearing issued by the Commissioner of the Department of Veterans Affairs on June 2, 2009. On July 22, 2009, a hearing was held at the Office of Administrative Hearings concerning the threshold question of the applicability of the Veterans Preference Act to the employment position held by the Petitioner. Rather than offering witness testimony on this issue, the parties elected to enter into a Stipulation of Facts for purposes of this stage of the proceedings. The parties also stipulated to the receipt of various exhibits. Counsel filed pre-hearing memoranda on July 22, 2009, and also provided legal argument during the hearing.

Appearances: Mike Bloom, Assistant Minneapolis City Attorney, appeared on behalf of the City of Minneapolis (the City). Gayle Gaumer, Attorney at Law, Wilson Law Firm, appeared on behalf of Steven Robert Shannon (the Petitioner).

Based upon the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS ORDERED as follows:

1. The Petitioner is entitled to the rights and protections of the Veterans Preference Act.

2. This matter will proceed to further hearing on August 20, 2009, concerning whether the Petitioner was removed for cause or for incompetence and what, if any, relief should be awarded.

Dated: July 30, 2009

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

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## MEMORANDUM

Under the Veterans Preference Act (VPA or the Act), a veteran can be removed from his or her position only "for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing."[1] The Act states, in relevant part, that it applies to:

> Person[s] holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who [are] veterans separated from the military service under honorable conditions . . . .[2]

Although the VPA itself does not limit its applicability to "permanent" or "regular" employees, Minnesota courts have interpreted the VPA to not apply to situations involving temporary or occasional employment.[3]

It is undisputed that the Petitioner is a veteran who was honorably discharged from military service[4] and that the City is an employer covered by the VPA. However, the City contends that the Petitioner's employment was "temporary" in nature and thus that he was not entitled to notice of his right to a hearing under the VPA when he received a "Notice of Separation" on January 16, 2009. The Petitioner asserts that he is entitled to the protections of the VPA regardless of whether the City and his union considered him a "temporary" employee and therefore is entitled to reinstatement and back pay pending a further hearing on whether he was removed for incompetency or misconduct.

### Factual Background

Based upon the factual stipulations of the parties and the exhibits that were received by agreement of the parties during the hearing on July 22, 2009, the following facts are assumed to be true for purposes of determining the threshold question of the applicability of the VPA to the Petitioner's job. Steven R. Shannon, the Petitioner, served on active duty in the U.S. Navy from February 5, 1970, until December 17, 1973. He received an honorable discharge. The Petitioner became an electrician and joined the International Brotherhood of Electrical Workers, Local 292 (IBEW). The Petitioner obtained employment off the IBEW hiring hall list, which included increasing temporary employment with the City of Minneapolis**.** He was one of a number of skilled trade and craft workers that the City of Minneapolis hired through the workers' respective union hiring halls.

In 1997, the Petitioner signed an Information Sheet for Temporary City Employees that emphasized that temporary employees are hired to perform job duties for the City on temporary basis and do not have status as a permanent employee or any guarantees of continuing employment. The Information Sheet stated that temporary employees can be employed for up to six months but "there is no guarantee that you will

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[1] Minn. Stat. § 197.46.
[2] *Id*.
[3] *Crnkovich v Independent School District No. 701*, 142 N.W. 2d 284 (Minn. 1966).
[4] Ex. 7 (DD 214N form).

be needed or kept on that long," and warned that, although there may be situations which require extending the length of time worked for the City, "this still does not give you permanent status." In order to obtain a permanent job with the City, the Information Sheet indicated that individuals had to apply for such positions through the City's Personnel Services Office. The Information Sheet included the following language that applied only to trades employees hired under contractual agreement between the City and the union hiring hall:

> If you have been hired under a contractual agreement between the City of Minneapolis and a Trade union, your PAY AND BENEFITS will be comparable, to the extent permitted by law, to any other "Hiring Hall" position you may accept, except with respect to overtime and/or premium or penalty pay provisions. You will be paid the applicable negotiated rate of pay. Generally, the City of Minneapolis pays overtime at one and one-half (1-1/2) times the hourly rate of pay for all hours worked over eight (8) per day or over forty (40) per week. Your FRINGE BENEFIT DEDUCTIONS will be sent to the applicable Health and Welfare fund. Also, the six-month limitation on temporary employment does not apply to those hired under contractual agreements with the Trade unions. All other information on this sheet is applicable to Temporary Trades Employees except insofar as it is different from the provisions listed here.[5]

On September 18, 2000, the Petitioner was again hired out of the union hiring hall list by the City. Although classified by the City as a "temporary" employee with a fixed 6-month term that could be extended every six months, the Petitioner was continuously re-employed by the City from September 18, 2000, until January 16, 2009.[6] The Petitioner's W-2s[7] and pay stubs[8] indicated that he earned the following wages from the City during this period of time:

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| 2000 | $18,337 |
| 2001 | $55,349 |
| 2002 | $62,678 |
| 2003 | $59,026 |
| 2004 | $60,770 |
| 2005 | $57,425 |
| 2006 | $59,996 |
| 2007 | $60,208 |
| 2008 | $58,144 |
| 2009 | $3,315 |

On January 16, 2009, the Local 292 Hiring Hall provided the Petitioner with a "Separation Notice." The Notice identified the Petitioner's first day of work as

[5] Ex. 3 (emphasis in original).
[6] Exs. 2–4. Based upon the Employee Job Change forms included in Ex. 4**,** it appears that the Petitioner received a six-month extension of his employment in June 2008 for a period to expire in December 2008, and that, in December 2008, his employment was extended only until January 16, 2009.
[7] Ex. 8.
[8] Ex. 9.

September 18, 2000, and his last day of work as January 16, 2009. The Notice gave the following explanation for Petitioner's release from employment: "The City of Minneapolis hired Mr. Shannon as a temporary employee. The City discontinued his employment due to limitations not allowing him to perform all of the essential functions required by the Traffic Division."[9] The City's Job Data information pertaining to the Petitioner notes that the Petitioner's entry date was May 12, 1997, that he was an intermittent temporary employee in the outside trades, and he was terminated effective January 17, 2009.[10] The City did not give the Petitioner notice of veterans' preference rights under Minn. Stat. § 197.46 (VPA or the Act) when it discharged him, alleging that he was not entitled to such rights because he was classified as a "temporary" employee.

In accordance with the Public Employees Labor Relations Act (PELRA), Local 292 has entered into collective bargaining agreements with the City setting forth various terms and conditions of employment. The collective bargaining agreement currently in effect covers the period of May 1, 2008, through April 30, 2011.[11] The labor contract includes a Letter of Agreement that was negotiated by Local 292 and the City which relates to the employment of temporary employees. The Letter of Agreement provides that, notwithstanding any other provision of the collective bargaining agreement to the contrary, the services of the union's hiring hall shall be made available to the City for the referral of qualified temporary employees; such temporary employees "may ordinarily be employed for periods of six (6) consecutive calendar months or less or for longer periods where the employment is associated with a special or capital-funded project." Under the Letter of Agreement, temporary employees "shall be paid the basic hourly wage rate established by the Union's prevailing area-wide collective bargaining agreement" and the City shall make appropriate contributions to the pension, welfare, fringe benefit and local apprenticeship funds specified by the area collective bargaining agreement. The Letter of Agreement further specifies:

> Persons employed under the provisions expressed herein shall be *at will* employees, i.e., they shall serve at the pleasure of the Employer. Such employees may be released from employment within the sole discretion of the Employer without regard to *seniority* or to *just cause* as those terms are used in the [Collective Bargaining] Agreement or elsewhere. Notwithstanding the provisions at paragraph 6, below, the release of a temporary employee from employment shall not be subject to review under the grievance or arbitration provisions of the Agreement or the rules and regulations of the Minneapolis Civil Service Commission. . . . .[12]

As a temporary employee, the Petitioner did not obtain his position of employment through the City's civil service process. He did not fill out an application or compete for the job, was not placed on or selected from a ranked list, did not serve a probationary period, and did not have just cause rights under the labor agreement. As a temporary employee, the Petitioner was simply referred out of the union hall to the employer upon the City's request, and was considered to be a temporary at-will

[9] Ex. 6.
[10] Ex. 5.
[11] Ex. 2.
[12] Ex. 2 (attachment B) (emphasis in original).

employee. The Petitioner received wages and benefits that were different from those of permanent employees. Other temporary employees were hired under the same six-month terms and conditions as the Petitioner. It is within the City's sole discretion whether to extend or terminate a six-month term of employment. In Petitioner's case, the City did extend his term of employment on a regular six-month basis.[13]

When the Petitioner learned of his VPA rights after his discharge, he filed a petition with the Commissioner of Veterans Affairs (Commissioner) alleging that the City had violated his VPA rights and seeking reinstatement together with back pay and benefits plus interest retroactive to the date of his removal. The Commissioner issued an order for hearing on the Petitioner's petition and further ordered that, if the Administrative Law Judge determined that the Petitioner had been deprived of his rights, the Administrative Law Judge should conduct a hearing on the veteran's requests "stated or related to his Petition."[14]

**Discussion**

As noted above, the VPA itself does not distinguish between persons in temporary or permanent positions. However, Minnesota courts have held that the VPA does not apply to positions that are "temporary" or "occasional" in nature.[15] The overall burden of proof in a case arising under the Act is on the veteran to establish that he or she is an honorably discharged veteran who was terminated without a hearing and was removed for reasons not constituting misconduct or incompetence. However, an employer's assertion that a specific job is not covered by the VPA is in the nature of an affirmative defense for which the employer has the burden of proof.[16] The applicability of the VPA to a particular case is a fact question, to be evaluated on a case-by-case basis, with consideration of all relevant factors.[17] The reviewing tribunal must examine the substance of the position and not just the title.[18]

Minnesota courts have looked at a number of factors to determine whether a veteran's "temporary" employment was exempt from the VPA. These factors have included whether the veteran was paid an hourly wage or a salary, whether employment benefits were provided, and whether the veteran had taken the position with the understanding that it was temporary in nature. Consideration of these factors lends some support to the City's contention that the Petitioner was not covered by the protections of the VPA, since it is undisputed that the Petitioner was paid an hourly wage[19] and was not afforded the same benefits that were provided to civil service

[13] Ex. 4.
[14] Notice of Petition and Order for Hearing, June 2, 2009.
[15] *See, e.g., Crnkovich v. ISD No. 701, Hibbing,* 142 N.W.2d 284 (Minn. 1966).
[16] *Gramke v. Cass County,* 453 N.W.2d 22, 25 (Minn. 1990); *Holmes v. Board of Commissioners of Wabasha County,* 402 N.W.2d 642, 644 (Minn. 1987); *State ex rel Caffrey v. Metropolitan Airport Commission*, 246 N.W.2d 637 (Minn. 1976).
[17] *Crnkovich,* 142 N.W.2d at 287.
[18] *Myers v. City of Oakdale*, 409 N.W.2d 848, 850 (Minn. 1987).
[19] Ex 2, Att. B; Ex. 9.

employees, including grievance rights. In addition, it is likely that the Petitioner was aware that the City classified his position as "temporary."[20]

However, Minnesota courts have looked beyond the label assigned by the employer to determine whether the employment was in fact temporary. A significant additional factor that has been considered is whether the employment was for a "fixed term" or for the completion of a specific task. The courts have held that a person who is hired for a fixed term or for a specific task is not discharged or "removed" for purposes of the VPA when that task is completed. Rather, the job terminates of its own force and the veteran cannot extend his position into permanent status by application of the Veterans Preference Act.[21]

In *Crnkovitch v. Independent School District No. 701, Hibbing*,[22] the Minnesota Supreme Court held that a seasonal carpenter who was hired by the School District without competitive examination to provide "sporadic, intermittent and temporary" services for an hourly wage while the city pursued regular selection of a permanent replacement for a retiree, did not have any vested right under the VPA to continue in that position as the permanent replacement. However, in *Anderson v. City of St. Paul*,[23] the Court specifically narrowed the *Crnkovich* exclusion to situations where the employee "had agreed to temporary status."[24] The Court emphasized in *Anderson* that the substance of the employment relationship must be scrutinized to avoid the unreasonable expansion of the temporary employee exception based on how an employer labels a particular position.

In *Anderson*, the court rejected St. Paul's attempt to characterize 23 truck drivers as "temporary" employees even though the trial court found that they had been duly appointed and reappointed to fixed-term "emergency" positions of only five days duration. The Minnesota Supreme Court held that they should legally be treated as permanent employees, noting that the city had repeatedly hired and rehired the drivers for those positions every five days, so that they had been employed continuously for 10 years. Similarly in *Castel v. Chisolm*,[25] the court held that a fireman was entitled to protection under the VPA even though his one-year fixed-term position had expired and someone else was hired to fill the position for the next year, noting that he had been continuously reappointed to the position annually for five years. Likewise, in *Lund v. Bemidji*,[26] the court treated a sewer worker who had been continuously employed for five years as a permanent employee of the city even though he had reapplied and had been reappointed annually to a position characterized by the city as a fixed-term, one-year job.

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[20] Ex. 3.
[21] *Crnkovich,* 142 N.W.2d at 286-87; *State ex rel. Castel v. Village of Chisholm*, 173 Minn. 485, 490, 217 NW. 681, 682 (1928).
[22] 273 Minn. 518, 142 N.W.2d 284 (1966).
[23] 241 N.W.2d 86 (Minn. 1976).
[24] *Id*.
[25] 173 Minn. 485, 488-490, 217 N.W. 681, 682 (1928).
[26] 209 Minn. 91, 94, 295 N.W. 514, 515-516 (1940).

In this case, although the Petitioner's position was labeled "temporary" and he did not receive the same wages and benefits as permanent employees, his six-month term of employment was consistently extended over the course of eight years. There is no evidence in the record that the Petitioner performed specific tasks in his position that, upon completion, signaled the end of his job. Instead, it appears that the City routinely extended Petitioner's six-month terms resulting in the Petitioner being continuously employed by the City from at least September 2000 to January 2009. This conduct demonstrates that the Petitioner was a "temporary" employee in name only, and the employment relationship established between the City and the Petitioner was in fact one of an indefinite and on-going nature that only ended when the City determined that the Petitioner could no longer perform all of his essential job functions. The Administrative Law Judge concludes that the City has failed to demonstrate that the Petitioner's position was temporary or occasional and not subject to the protections of the Veterans Preference Act.

During the hearing, the City pointed out that the Minnesota Legislature enacted special legislation in 1988 authorizing the City to negotiate agreements with local labor organizations concerning the use of union hiring hall services and terms and conditions of employment for skilled trade and craft workers, including electrical workers. The 1988 law specifically provides that persons hired under such agreements: (1) are not subject to the provisions of chapter 44 of the Minnesota Statutes, chapter 19 of the city charter, or civil service rules and regulations adopted under chapter 19; (2) are not public employee entitled to pension benefits under Minnesota Statutes, chapter 353 or any other state laws providing for pension benefits unless the person was otherwise vested; and (3) are at-will employees of the City who may be released from their positions pursuant to the terms of the applicable collective bargaining agreement and are not entitled to review of those discretionary decisions under Minnesota Statutes 179A.20, subd. 4, or 179A.25.[27] While the special legislation does state that it "supersedes any inconsistent provisions of the Minneapolis city charter or other law or rule," it does not explicitly state that it supersedes the VPA.[28]

The Veterans Preference Act provides that, if the Legislature wishes to abrogate the application of the VPA, it must expressly state its intention in subsequent legislation:

> No provision of any subsequent act relating to any such appointment, employment, promotion, or removal shall be construed as inconsistent herewith or with any provision of sections 197.455 and 197.46 unless and except only so far as expressly provided in such subsequent act that the provisions of these sections shall not be applicable or shall be superseded, modified, amended, or repealed. Every city charter provision hereafter adopted which is inconsistent herewith or with any provision of these sections shall be void to the extent of such inconsistency.[29]

[27] Laws 1988, Ch. 471, Sec. 1, Subd. 4.
[28] Laws 1988, Ch. 471, Sec. 3.
[29] Minn. Stat. § 197.48.

Prior to 1976, the Minnesota Supreme Court held exclusion from the VPA could occur simply by the adoption of a subsequent inconsistent law.[30] In 1976, the Court restricted this holding to its unique facts and held that exclusion from the VPA had to be explicitly stated in any subsequent legislation. In *State ex rel Caffrey v Metropolitan Airports Commission,* [31] the Court held that statutory language that MAC employees are "removable at the pleasure of" the commission was not sufficient to show that the Legislature intended to repeal or supersede the veterans preference rights granted to MAC employees. The Court stated that consistent with the VPA's "express (abrogation) provision", any subsequent legislation had to explicitly state that the VPA would not apply.[32]

Following *Caffrey*, the Minnesota Court of Appeals considered the application of the VPA in *Schoen v County of St. Louis*.[33] In that case, the Legislature passed an act establishing St. Louis County's civil service system in 1941. That act provided:

> All acts and parts of acts inconsistent with sections 383C.03 to 383C.059 are hereby repealed to the extent necessary to give effect to the provisions of sections 383C.03 to 383C.059, *any provision of Laws 1931, chapter 347 to the contrary notwithstanding*.[34]

Unlike the special legislation cited by the City in this case, the statute that created the St. Louis County civil service system specifically stated that its provisions prevailed over any contrary provision of the VPA. It was because of this that the Minnesota Court of Appeals concluded "that the legislature was aware of the conflict with the veterans preference law and chose to supersede the hearing requirement when an employee was discharged from a probationary position."[35]

The Court of Appeals again considered the issue of whether a subsequent statute exempted a public employer from the VPA in *Anderson v. City of Minneapolis.*[36] While some portions of the Disability Act expressly excluded the application of the VPA, the particular statutory provision at issue in *Anderson* did not. The Court observed:

> The Disability Act was enacted subsequent to the VPA. See 1973 Minn. Laws ch. 133 § 18; 1907 Minn. Laws ch. 263, § 2. Moreover, the Disability Act expressly excludes the VPA's application only in particular sections; section 422A.18 is not one of those sections. The legislature chose not to exclude the VPA in section 422A.18.[37]

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[30] *State ex rel Stubben v. Board of County Commrs*., 273 Minn. 361, 141 N.W.2d 499 (1966).
[31] 310 Minn. 480, 485, 246 N.W.2d 637, 640 (1976).
[32] *Id.*
[33] 448 N.W.2d 112 (Minn. App. 1989).
[34] 448 N.W.2d at 114 (emphasis added). The emphasized provision is a specific reference to the Veterans Preference Act, as the Legislature enacted it in 1931.
[35] *Schoen*, 448 N.W.2d at 115.
[36] 493 N.W.2d 156 (Minn. App. 1992) *rev'd on other grounds*, 503 N.W.2d 780 (Minn. 1993).
[37] *Anderson*, 493 N.W.2d at 158.

The Administrative Law Judge concludes that the 1988 special legislation cited by the City does not abrogate or supersede the application of the VPA to the position held by the Petitioner. Like the statutes involved in *Anderson* and *Caffrey*, the special legislation was enacted long after the VPA and does not expressly provide for abrogation of the VPA or include the VPA among the list of statutes that it specifies will not apply to the hiring agreements authorized by the legislation. Instead, the special legislation merely exempts hiring hall agreements from the Municipal Civil Service Act (Minn. Stat. Chapter 44); public employee pension laws (Minn. Stat. Chapter 353); and two statutory provisions of PELRA regarding grievance procedures (Minn. Stat. §§ 179A.20, subd. 4, and 179A.25). Nothing in the special legislation indicates that the Legislature intended that it would supersede the VPA or that employees hired under such arrangements would be excluded from the protections of the VPA. If the Legislature intended that the VPA would not apply to employees hired through union hiring halls pursuant to the special legislation, it would have said so explicitly.

Despite being labeled a "temporary" employee, it is undisputed that the Petitioner was continuously employed by the City for over eight years. There is no indication in the record that the Petitioner performed specific tasks in his position that, upon completion, would signal the end of his job. To the contrary, the record indicates that the employment relationship between the City and the Petitioner was in fact one of an indefinite and on-going nature that only ended when the City determined that the Petitioner could no longer perform all of his essential job functions. The fact that the Petitioner's job ended only when the City determined that he was incompetent to perform the job, and not upon conclusion of a particular task or the end of a six-month term, is a significant factor supporting the conclusion that the Petitioner was not a "temporary" employee exempt from the VPA. Accordingly, the Administrative Law Judge concludes that the temporary employment exception to the VPA is not applicable. In accordance with the Order for Hearing issued by the Commissioner of Veterans Affairs, this matter will proceed to hearing on August 20, 2009, on the merits of whether the Petitioner was removed for misconduct or incompetence under the VPA.

**B. L. N.**